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No. 02-5664

IN THE

Supreme Court of the United States

DR. CHARLES THOMAS SELL, D.D.S.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF OF THE LAW OFFICE OF JULIE RUIZ-SIERRA IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE*
BRIEF IN SUPPORT OF PETITION
FOR CERTIORARI

COMES NOW the Law Office of Julie Ruiz-Sierra and respectfully moves this Court for leave to file an *amicus curiae* brief in support of the petition for certiorari, pursuant to Rule 37(2)(b) of the Rules of Court, and in support of this motion, states:

1. The law firm of Lewis, Rice, and Fingersh, L.C., as counsel for the petitioner, Dr. Charles Thomas Sell, D.D.S., has withheld consent to Julie Ruiz-Sierra's request to file an *amicus curiae* brief in support of the petition for certiorari.

2. The Law Office of Julie Ruiz-Sierra (LOJRS) is a solo criminal defense practice in Davis, California, specializing in drug offenses and dedicated to drug policy reform advocacy. Julie Ruiz-Sierra lectures on the impact of drug prohibition on civil rights and teaches workshops on invoking fundamental rights during a police encounter as a public service. She has been an activist for drug policy reform and a research specialist in drug law since 1997.

3. As part of its philosophical commitment to ending drug prohibition, LOJRS supports the advancement of drug policies that construe drug abuse as a social and medical issue rather than a criminal justice issue. LOJRS promotes the policy stance that individuals should not be punished for what they put into their own bodies so long as they do not cause proximate harm to others and promotes the concept of the individual's sovereignty over his own mind and body.

4. As a legal practice devoted to promoting the physical and mental autonomy of the individual, LOJRS recognizes the fundamental right of bodily integrity. This universally recognized human right, which assures the inviolability of the human body

and an individual's autonomous decision-making authority in matters affecting his or her body and mind, is one of the most basic aspects of the expression of free will necessary for the enjoyment of liberty.

5. LOJRS has a critical interest in this case because the government's claim of authority to involuntarily administer psychotropic medication to non-dangerous pretrial detainees for the sole purpose of rendering them competent to stand trial constitutes a serious infringement of the fundamental right to bodily integrity. Said claim, if the decision of the court below is affirmed, would be a threat to the development of progressive governmental drug policy and would set dangerous judicial precedent for the use of involuntary medication in other criminal justice contexts. As a practice with over five years of experience in drug policy issues, The Law office of Julie Ruiz-Sierra has developed expertise that can aid this Court in understanding the broad implications this case holds for the liberty interest of all Americans to exercise control over their own bodies and refuse unwanted medication. Accordingly, the undersigned counsel's perspective on this issue would be of interest to this Court.

WHEREFORE, for the forgoing reasons, the Law Office of Julie Ruiz-Sierra respectfully requests this Court grant its motion for leave to file its brief as *amicus curiae* in support of the petition for certiorari.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE*

Without the written consent of the parties, and on a motion to this Court for leave to file, the undersigned counsel submits this brief as *amicus curiae* in support of petitioner pursuant to Rule 37(2)(b) of the Rules of Court.[1]

The Law Office of Julie Ruiz-Sierra (LOJRS) is a solo criminal defense practice in Davis, California, specializing in drug offenses and dedicated to drug policy reform advocacy. Julie Ruiz-Sierra lectures on the impact of drug prohibition on civil rights and teaches workshops on invoking fundamental rights during a police encounter as a public service. She has been an activist for drug policy reform and a research specialist in drug law since 1997.

As a legal practice devoted to promoting the physical and mental autonomy of the individual, LOJRS recognizes the fundamental right of bodily integrity. This universally recognized human right[2], which assures the inviolability of the human body and an individual's autonomous decision-making in matters affecting his or her body and mind, is one of the most basic aspects of the expression of free will necessary for the enjoyment of liberty. Indeed, the right of bodily integrity is acknowledged to be one of the most cherished freedoms in a civil society[3].

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1. No counsel for a party authored this brief in whole or part, and no person or entity other than the Law Office of Julie Ruiz-Sierra, as *amicus curiae*, or its counsel, made a monetary contribution to the preparation and submission of this brief.

2. *The Universal Declaration of Human Rights*, art. 3, G.A. Res. 217A (III), at 71, U.N. Doc. A/810 (1948). ("Article 3: Everyone has the right to life, liberty, and security of person.")

3. Denis E. Cichon, *The Right to "Just Say No": A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 La. L. Rev. 283, 284 (1992).

Perhaps no image so horrifically evokes the specter of oppressive government as that of a hypodermic syringe in the hands of a government agent, aimed at the defenseless body of an unwilling citizen. LOJRS has a critical interest in this case because the government's claim of authority to involuntarily medicate Dr. Sell, a non-dangerous pretrial detainee afforded the presumption of innocence, has broad implications for the liberty interest of all Americans to exercise control over their own bodies and refuse unwanted medication. LOJRS submits that the administration of unwanted psychotropic medication to incompetent defendants for the sole purpose of rendering them competent to stand trial constitutes a serious infringement of the fundamental right to bodily integrity which deserves the highest level of scrutiny afforded under the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution.

SUMMARY OF ARGUMENT

The proscription against trying the incompetent has long been an elemental tenet of constitutional criminal procedure. *See Bishop v. United States*, 350 U.S. 961 (1956) and *Pate v. Robinson*, 383 U.S. 375 (1966). It is one of the features that ensure the constitutional guarantee to a fair trial by providing that trials lacking a fundamental level of fairness should not be held at all. Today, courts around the nation are variously interpreting that guarantee as a justification for involuntarily medicating incompetent pre-trial detainees in order to "render them competent to stand trial." The court below has affirmed an order to involuntarily medicate Dr. Sell, a non-violent pre-trial detainee, with psychotropic medication for this purpose. *United States v. Sell*, 252 F.3d 560, 572 (8th Cir. 2002). In so doing it constructed a three-part test to review involuntary medication orders for procedural due process that failed to account for how the effects of involuntary medication occasion several forms of trial prejudice. *Id.* at 567-568.

LOJRS suggests that because the intended governmental action in this case infringes on a clearly established fundamental right, it must be reviewed under a strict scrutiny standard rather than the *Sell* court's three-part test. In holding that the government can forcibly medicate a pretrial detainee for the sole purpose of rendering him competent to stand trial, the Court of Appeals for the Eighth Circuit has improperly balanced Dr. Sell's right to bodily integrity and liberty interest in refusing unwanted medication against the government's interest in bringing him to trial. The *Sell* court failed to recognize that in this case petitioner's liberty interest in avoiding unwanted medication is more than merely "significant." *Id.* at 565. Since the liberty interest in refusing unwanted medication derives from the right to bodily integrity, it is *fundamental* and protected under the due process clauses of the Fifth and Fourteenth Amendments. Because the *Sell* court did not recognize the right in question to be a fundamental one, it failed to apply strict scrutiny and applied an erroneous lower standard of review instead.

When reviewed under a strict scrutiny standard the government's attempt to circumvent the proscription on trying an incompetent defendant with mind-altering medication fails to evince a policy narrowly tailored to a compelling interest that outweighs petitioner's fundamental right. For this reason LOJRS respectfully requests that the petition be granted.

ARGUMENT

I. The Right to Bodily Integrity is a Clearly Established Fundamental Right Guaranteed by the Due Process Clause of the Fifth and Fourteenth Amendments that Encompasses the Right to Refuse Unwanted Psychotropic Medication.

The text of the Constitution does not expressly protect against forcible intrusions of the human body such as the non-volitional administration of psychotropic drugs by injection. Yet it is well settled that the Due Process Clause of the Fourteenth Amendment clause provides substantive protection for rights that have no textual support in the Constitution. *Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (1992). This substantive component bars certain government actions under certain circumstances regardless of the fairness of the procedures used to implement them, *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) (quoting *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992)), and provides heightened protection against governmental interference with certain fundamental rights and liberty interests. *Id.* at 720.

Whether substantive due process protects a particular liberty interest is determined by an inquiry into whether the right in question is fundamental. "The determination of whether a right is fundamental begins with an examination of the teachings of history and solid recognition of the basic values that underlie our society." *Bee v. Graves*, 744 F.2d 1387, 1392 (10th Cir. 1984) (citations omitted).

Traditionally, rights deserving of substantive protection are those that relate to "freedom of action in a sphere contended to be 'private.'" *Paul v. Davis*, 424 U.S. 693, 713, (1976). This Court has held that such "private" rights include the right to marriage (*Loving v. Virginia*, 388 U.S. 1 (1967)),

to procreation (*Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942), to make decisions about the education and upbringing of one's children (*Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)), to use contraception (*Griswold v. Connecticut*, 381 U.S. 479 (1965), and to abortion (*Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood, supra)*. Although these fundamental rights pertain to personal matters, the court has not necessarily subsumed them under the right to privacy. In *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990), the Court suggested that refusing unwanted lifesaving medical treatment, although traditionally found to be encompassed by a generalized constitutional right to privacy by many state courts, was an issue more properly analyzed in terms of a Fourteenth Amendment liberty interest. *Id.* at 279 n.7.

This Court has also recognized that "bodily integrity", or the right to control one's own body and make decisions affecting it, is part of this substantive protection. *Planned Parenthood, supra* at 915-916, (Stevens, J., concurring in part, dissenting in part.); *see also Washington v. Glucksberg, supra*, at 720; *Albright v. Oliver*, 510 U.S. 266, 272 (1994).) The ability to decide for oneself those matters affecting one's body and mind is one of the most valued liberties in a civil society. Indeed, "our notions of liberty are inextricably entwined with our idea of physical freedom and self-determination." *Cruzan, supra*, at 287 (O'Connor, J., concurring.)

Our common law has long accorded protection to the right of self-determination in questions of medical treatment. The principle of informed consent rests upon the recognition of the right of every human being to determine what shall be done with his own body. *In re Cincinnati Radiation Litigation*, 874 F. Supp. 796, 816 (S.D. Ohio, 1995). Thus the tort of battery includes medical procedures performed

on patients without their consent. *See, e.g.*, W.E. Shipley, Annotation, *Liability Of Physician Or Surgeon For Extending Operation Or Treatment Beyond That Expressly Authorized*, 56 A.L.R.2d 695 (1957); Restatement (Second) of Torts § 53 cmt. a, illus. 3 (1965).

The contours of the right to be free from bodily intrusion have developed over a long line of cases involving non-consensual invasive medical procedures[4]. In *Union Pacific Ry. Co. v. Botsford*, 141 U.S. 250 (1891), this Court ruled that a court could not order someone to submit to a non-consensual surgical examination, stating,

> No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person, free from all restraint and interference of others, unless by clear and unquestionable authority of law . . . "The right to one's person may be said to be a right of complete immunity: to be let alone."

Id. at 251, *quoting* Cooley on Torts, 29.

In *Skinner v. Oklahoma ex rel. Williamson*, *supra*, this Court struck down a statute that mandated the sterilization of habitual criminals, finding that elementary notions of due process would require the state to take appropriate steps to safeguard the liberty of the individual by affording him procedural due process before "he is condemned to an irreparable injury to his person." *Id.* at 545 (Stone, J., concurring).

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4. For the detailed analysis of this issue see Morris L. Hawk, *The 'Kingdom of Ends': In re Cincinnati Radiation Litigation and the Right to Bodily Integrity*, 45 Case W. Res. 997 (1995).

Perhaps the most notorious of these cases, *Rochin v. California*, 342 U.S. 165 (1952), involved the non-consensual stomach pumping of a man suspected of ingesting morphine capsules after the police had tried, but failed, to wrest them from his throat. Justice Frankfurter explained that regard for the requirements of the Due Process clause impose upon the Court a duty to review criminal proceedings to ascertain whether they offended "those canons of decency and fairness which expressed the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses." *Id.* at 169. He concluded that the police invasion of the defendant's body "shocked the conscience":

> Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents — this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.

Id. at 172.

Even so, not all medical procedures invasive of bodily integrity have been found to violate due process. This court has twice found that some minimal invasions, in specific contexts, do not offend due process. For example, compulsory vaccinations for smallpox were upheld in *Jacobsen v. Massachusetts*, 197 U.S. 11 (1905). The defendant in *Jacobsen* challenged a Massachusetts statute that called for the vaccination of all fit adults on the grounds that it invaded his liberty and his inherent right to "care for his own body and health in such a way as to him seems best" and therefore was "nothing short of an assault upon his person." *Id.* at 26.

The Court acknowledged that:

> [t]here is, of course, a sphere within which the individual may assert the supremacy of his own will and rightfully dispute the authority of any human government, especially of any free government existing under a written constitution, to interfere with the exercise of that will

Id. at 29.

Nevertheless, the Court found that the individual's will was outweighed by the state's need to prevent a smallpox epidemic, but noted that its result might have been different if the vaccination had *seriously impaired* the petitioner's health. *Id.* at 39 (emphasis added).

In *Schmerber v. California*, 384 U.S. 757 (1966), the court upheld a compelled blood alcohol content test of an automobile accident victim for the purpose of collecting evidence of a crime. *Compare Winston v. Lee*, 470 U.S. 753 (1985) (holding that the government may not compel surgery for the removal of a bullet from a defendant's body for the same purpose where alternative means exist). A police officer ordered that a blood sample be taken when the victim was unconscious in the emergency room. The Court noted that the bodily intrusion in *Schmerber* was minor because the test collected a minimal amount of blood and involved "virtually no risk, trauma, or pain." *Id.* at 771. But it still carefully limited its holding to the particular facts of the case, and emphasized that:

> [t]he integrity of the individual's person is a cherished value of our society. That we hold today that the Constitution does not forbid the state's minor intrusions into an individual's body under strictly limited conditions *in no way indicates that it permits more substantial intrusions or intrusions under other conditions.*

Id. at 771-772 (emphasis added.)

It should be borne in mind that Dr. Sell has not been declared incompetent to handle his own affairs, but rather has merely been found incompetent to stand trial because he suffers from delusional disorder of the persecutory variety. Whether forcible medication would restore his competency to stand trial is not knowable with any degree of certainty; what is known, at best, is that antipsychotic medication may suppress the symptoms of his illness[5]. However, use of these medications involves substantial risk of dangerous side effects that include permanent physical impairment and possibly death[6]. Like all competent adults he retains the right to make his own determinations regarding the risks inherent in any medical treatment. His right is not diminished by the fact that he is being held to answer for a crime.

As was the case with the defendant in *Skinner*, the proposed course of treatment in the instant case subjects Dr. Sell to the risk of irreparable injury to his person[7]. The injection will likely be administered by force, with staff at the government psychiatric facility holding him down while government doctors drive the needle into his body.

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5. Antipsychotic medication does not "cure" mental illness; It suppresses symptoms of psychoses such as hallucinations, delusions, and paranoid ideation. (*See*, e.g., Thomas G. Guthiel and Paul S. Appelbaum, *"Mind Control," "Synthetic Sanity," "Artificial Competence," and Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, 12 Hoftstra L. Rev. 77, 101 (1983).) Once a regimen of antipsychotics is discontinued, symptoms are likely to recur. *Ibid.*

6. *See* footnote 3 above.

7. *Ibid.*

The struggle to medicate him, like the struggle in *Schmerber*, is an unnecessarily brutal act. The fact that such an act would so readily be visited upon on a non-violent pre-trial detainee charged with a non-violent crime, challenges the concept of fairness we would extend even to those charged with greater offenses.

Unlike the invasion of the body with a syringe containing relatively benign inoculants or with an empty syringe for drawing a small sample of blood, the forced injection of anitipsychotic medication is not free from trauma or indignity. Given that Dr. Sell's has thus far received no treatment for his condition, such an act is likely to aggravate his paranoia. Considering the side effect profile of the medication, it cannot be said to be free of serious impairment. But the feature that most distinguishes the forcible administration of medicine in this case to the injections in *Jacobsen* and *Schmerber* is that in those cases there was a clear public safety rationale offered for weighing the balance of interests in the government's favor. Vaccinations are sometimes required to prevent deadly epidemics and investigating and prosecuting drunk driving cases serves the function of reducing accidents. No such compelling safety justification exists in the instant case. The Court of Appeals for the Eighth circuit affirmed the district court's finding that Dr. Sell posed no danger to himself or others. *Sell*, *supra*, at 565. He is not violent and the medication is not required to better manage his detainment.

A long line of constitutional jurisprudence and, even before it, strong common law traditions uphold Justice's Steven's assertion that the "liberty interest of citizens to resist the administration of mind altering drugs arises from our Nation's most basic values." *Washington v. Harper*, 494 U.S. 210 (1990) (Stevens, J., dissenting). Dr. Sell asserts the right to refuse the invasion of his person via the forcible administration of psychotropic medication, under the due

process clause of the Fifth and Fourteenth Amendments. This court has held that individuals possess "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the due process clause of the Fourteenth Amendment" (*Id.* at 221-222.) and that far from being minimal, the "forcible injection of medication into a non-consenting person's body represents a substantial interference with that person's liberty" (*Id.* at 229.)

The fundamental rights of pretrial detainees "still cloaked with the presumption of innocence" are not of a smaller degree than those of free citizens. *Sell*, *supra*, at 574 (Bye, J., dissenting). To argue that the proposed course of action in this case would violate Dr. Sell's right to bodily integrity *is not* a suggestion that the government cannot constitutionally restrain his liberty by detaining his person. The presumption of innocence afforded pretrial detainees does not immunize them from the reasonable restraints of their confinement. *Bell v. Wolfish*, 441 U.S. 520, 534 (1979). Rather, LOJRS submits that the government may restrain his liberty no further in this instance by invading it through the non-consensual administration of psychotropic medicine.

II. The Forcible Administration of Psychotropic Drugs for the Sole Purpose of Rendering a Pretrial Detainee Competent to Stand Trial is a Governmental Action Infringing on the Fundamental Right to Bodily Integrity and Must be Subject to Strict Scrutiny.

There can be no doubt that a right is infringed when its exercise is prohibited. Erwin Chemerinsky, *Constitutional Law: Principles and Policies*, 2d ed., at 766 (2002). Where a person is physically restrained to overcome his resistance to a medical procedure, as Dr. Sell will eventually be if the decision below is affirmed, he is effectively prevented from exercising his right to refuse that procedure. "Government action that infringes a fundamental right will survive a

substantive due process challenge only if it can survive strict scrutiny, i.e., if it is narrowly tailored to a compelling government interest." *United States v. Brandon*, 158 F.3d 947, 956 (6th Cir. 1998), *citing Roe v. Wade*, 410 U.S. 113, 154 (1973).

In *Brandon*, the Sixth Circuit Court of Appeals held that where the government seeks to forcibly medicate a pretrial detainee for the sole purpose of rendering him competent to stand trial, the proposed action infringes the detainee's fundamental right to be free from bodily intrusion, and must therefore be subject to strict scrutiny. *Id.* at 957, *citing Bee v. Graves*, *supra*, 744 F.2d at 1395. The *Brandon* court was careful to note that its determination did not conflict with this Court's application of the rational basis standard in *Washington v. Harper*, 494 U.S. at 238, because *Harper* involved an incarcerated felon rather than a pretrial detainee, and the decision's rationale was based upon the premise that the government's action was justified by concerns over prison administration, whereas in *Brandon* the sole justification related to trial administration.

The *Brandon* court found it was not bound by the one Supreme Court decision to review the forcible medication of a pretrial detainee, *Riggins v. Nevada*, 504 US 127 (1992). In *Riggins* this court used language suggestive of strict scrutiny in dicta[8], but it expressly refrained from adopting a substantive standard because that question was not before it. *Id.* at 136.

This case presents a situation never before addressed by this court, and one which threatens to misread and grossly extend this court's holdings in *Harper* and *Riggins*. Unlike in *Harper*, the Government does not seek to justify the

8. The Court alluded that the district court would have satisfied due process in its decision to medicate Riggins if it had considered "less restrictive means". *Id.* at 135.

forcible drugging of Dr. Sell with reasons relating to penological concerns such as safety. The Eighth Circuit's holding approves the forced drugging of Dr. Sell because that court failed to distinguish the rights of a pretrial detainee from those of a convicted inmate, and consequently failed to apply the correct standard of scrutiny. It further misread *Riggins* to mean that strict scrutiny was not required. Finally, rather than follow the substantive standard previously prescribed for the medication of a non-violent pretrial detainee by a sister circuit, it relied on the holdings of lower courts and constructed a convoluted three-part test that will only promote further non-uniform application of the law with respect to forced medication. *Sell*, *supra*, at 567-568.

By granting the petition in the instant case, this court now has the important opportunity it lacked in *Riggins* to prescribe a substantive standard for the forcible medication of non-violent pretrial detainees.

III. The Government's Attempt to Forcibly Medicate Dr. Sell with Psychotropic Drugs is Insufficiently Tailored to Its Interest in Conducting Fair Trials.

The court below recognized that the government has an essential interest in bringing a defendant to trial, which is "fundamental to a scheme of ordered liberty and a prerequisite to social justice and peace." *Sell*, *supra*, at 568, *quoting Illinois v. Allen*, 397 U.S. 210 (1970) (Brennan, J., concurring.) The constitutional guarantee of a fair trial for those accused of a crime (U.S. Const. Amend. VI) is likewise fundamental to an ordered scheme of liberty. It ensures that persons shall not be convicted of crimes without adequate opportunity to defend themselves. Dora W. Klein, *Trial Rights and Psychotropic Drugs: The Case Against Administering Involuntary Medications to a Defendant During Trial*, 55 Vand. L. Rev. 165, 189-190 (2002). The Sixth Amendment also grants several specific procedural

rights including the right to be tried by an impartial jury, to confront and present witnesses, and to receive effective assistance of counsel. *Id.* at 190. The proscription against trying the incompetent is one of several judicial interpretations of the fair trial guarantee that give it meaning and effect in practice. *Pate v. Robinson*, *supra*, at 378. Another is the right to be present at trial. *Snyder v. Massachusetts*, 291 U.S. 97, 105-106 (1934) (finding the privilege guaranteed by the Fourteenth Amendment).

It is the inherent inequity in trying the incompetent that drives the controversy in this context, and requires that incompetent defendants be restored to competency if a trial is to proceed at all. Whether the Government's proposed action of medicating Dr. Sell in order to restore his competence to stand trial is narrowly tailored to its interest will turn, as the *Brandon* court suggested, on "whether that action is the least restrictive and least harmful means of satisfying the government's goal . . . of rendering [the accused] competent to stand trial in a proceeding that is *fair to both parties*." *Brandon*, *supra*, at 960 (emphasis added).

While the forcible physical invasion of Dr. Sell's body with medication raises serious concerns about fair treatment in and of itself, the effects of forcible medication have been recognized to interfere with the exercise of procedural and other fundamental rights at trial.

> Psychotropic drugs can interfere with a defendant's ability to exercise procedural rights by causing sedation, producing feelings of restlessness and anxiety, diminishing awareness of and interest in the surrounding environment, disrupting memory, and inducing all manner of motor disturbances . . . [They] are also likely to impair many abilities necessary for presenting a defense, including the ability to pay attention to

> what witnesses, or the attorneys, or anyone else in the courtroom is saying; to offer comments or suggestions or otherwise engage in dialogue about the trial; to understand and respond to questions while testifying; and even to decide whether to testify. By administering involuntary antipsychotic medications, the government interferes with the defendant's general right to be present, as well as with his more specific rights to receive effective assistance of counsel, to confront witnesses, to present evidence, and to testify on his own behalf.

Klien, *supra*, at 191. *See, e.g.*, *Bee v. Graves*, *supra*, at 1392 (Antipsychotic drugs have the capacity to severely and permanently affect an individual's ability to think and communicate, thereby affecting First amendment right to free thought and speech); *Riggins v. Nevada*, *supra*, at 137-138 (Expert testimony regarding effect of antipsychotic medication cannot cure possibility that thought process, participatory ability, or demeanor were affected at trial, thereby infringing the First Amendment right to free thought and speech and the Sixth Amendment right to fair trial.); and *United States v. Brandon*, *supra*, at 953-954 (Recognition that forced medication implicates First, Fifth, and Sixth Amendment rights at trial). It has also been suggested that medicating defendant for the express purpose of altering his brain chemistry raises the same fundamental fairness concerns as when it is alleged that the prosecution has manipulated material evidence. *Riggins*, *supra*, at 139 (Kennedy, J., concurring).

Every time the government seeks to involuntarily medicate a pretrial detainee in order to attempt to render him competent to stand trial, it not only invades the integrity of his body, it creates substantial risk that defendant's constitutional right to a fair trial will be violated. Some courts have suggested that curative measures including jury

instructions about the effects of the medication sufficiently address the threat to defendant's trial rights. *United States v. Weston*, 255 F.3d 873, 886 (D.C. Cir. 2001). Putting aside the possibility that such an announcement would create an atmosphere where the stigma associated with psychiatric medication prejudices the jury's view of the defendant, curative instructions can only be applied to those potential inequities that are clearly recognized. Medication creates a risk of altering a defendant's cognition and therefore his behavior at trial in ways that cannot be detected, much less reviewed on appeal should such prejudice be claimed after conviction:

> The avowed purpose of the medication is not mere functional competence, but rather competence to stand trial . . . elementary protections against state intrusion require the state in every case to make a showing that there is no significant risk that the medication will impair or alter in any material way the defendant's capacity or willingness to react to the testimony at trial or to assist his counsel. Based on my understanding of the medical literature, I have substantial reservations that the state can make that showing. Indeed, the inquiry itself is elusive, for it presupposes some baseline of normality that experts may have some difficulty in establishing for a particular defendant, if they can establish it at all.

Riggins, *supra*, at 141 (Kennedy, J., concurring).

Governmental purpose "cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Bee v. Graves*, *supra*, at 1396 (*quoting Shelton v. Tucker*, 364 U.S. 479, 488 (1960)). Here, the government would attempt to address one aspect of inequity in a given judicial proceeding by means that restrict the exercise of enumerated constitutional rights and introduce other forms of prejudice into the trial. Rendering an incompetent defendant

such as Dr. Sell competent to stand trial by forcibly medicating him with drugs that would create a condition wherein several other fundamental rights were prejudiced, is not the least restrictive means of rendering him competent to stand trial.

Less restrictive means to achieve the government's purpose exist. As the dissent in the court below noted, Dr. Sell will not go free if he does not stand trial. He can be civilly committed until he is rendered competent through other forms of treatment or until he agrees to take psychotropic drugs voluntarily. *United States v. Sell*, *supra*, at 574 (Bye, J., dissenting.) Psychiatric treatment without antipsychotic medication or treatment wherein medication is voluntarily taken can also restore competency without raising concerns about trial prejudice. In the instant case, Dr. Sell's psychiatrist has recommended such a course of treatment, along with access to reading materials and opportunity to exercise, but the doctors at the government's psychiatric facility at Springfield have not attempted to treat him by any means other than antipsychotic medication. For these reasons, the government's action is not sufficiently tailored to its underlying compelling interest in the fair adjudication of criminal trials.

Dr. Sell's commitment without treatment has now continued for a period of time almost equal to that he would have to serve in prison if convicted of the crimes he is charged with. It should not be forgotten that defendants have as much of an interest in proceeding to trial for an opportunity to be acquitted of charges as the government does in bringing them there in the hopes of attaining a conviction. Prolonged civil commitment may ultimately prove more costly than a syringe full of antipsychotic medication and the expedited trial of a complacently sedated defendant, but as Justice Stevens noted in *Riggins*, "the Constitution requires that society bear this cost in order to preserve the integrity of the trial process." *Riggins*, *supra*, at 145 (Stevens, J., concurring).

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges the Court to grant the petition for certiorari.

Respectfully submitted,

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